

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 20

UNITED STATES PATENT AND TRADEMARK OFFICE

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Ex parte KATHY J. POTECHIN,
ERIC P. GUENIN,
XIAOZHONG TANG,
JAIRAJH MATTAI,
ELIZABETH LINN,
WILSON LEE, and
PAUL J. VINCENTI

Appeal No. 2002-0441
Application No. 09/273,152

ON BRIEF

Before ADAMS, GRIMES, and GREEN, Administrative Patent Judges.

GREEN, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134 from the examiner's final rejection of claims 2, 3, 5, 6, 8-22, 24, 27-30 and 32-39. Claim 2 is representative of the subject matter on appeal, and reads as follows:

2. A cosmetic composition made by combining:
 - (a) at least one active cosmetic material selected from the group consisting of antiperspirant active materials and deodorant active materials;

(b) a silicone gel material which is made by combining:

(i) a crosslinked organopolysiloxane material as a gelling agent wherein the organopolysiloxane is made from at least one silicone hydride cross-linking agent and at least one member selected from the group consisting of (A) a vinyl polysiloxane and (B) an alpha, omega diene; and

(ii) a liquid base vehicle for the gelling agent wherein the vehicle is made by combining at least one member of the group consisting of volatile silicone materials and non-volatile silicone materials; and

(c) at least one nonionic surfactant having an HLB value of 8-16 and an absorption time of less than 10 minutes as evaluated by testing a sample prepared by mixing

(i) 95% of a mixture of 5 weight % cyclopentasiloxane cetearyl dimethicone/vinyl crosspolymer, 73.5 % weight cyclomethicone and 22.5 weight % aluminum zirconium tetrachlorohydrate glycine complex as a first mixture with (ii) 5 weight% of the non-ionic surfactant as a second mixture; and

(d) at least one emollient material selected from the group consisting of isopropyl myristate, isopropyl palmitate, isopropyl stearate, isopropyl isostearate, butyl stearate, octyl stearate, hexyl laurate, cetyl stearate, diisopropyl adipate, isodecyl oleate, diisopropyl sebacate, isostearyl lactate, C₁₂₋₁₅alkyl benzoate, myreth-3 myristate, dioctyl malate, neopentyl glycol diheptanoate, dipropylene glycol dibenzoate, C₁₂₋₁₅alcohols lactate, isohexyl decanoate, isohexyl caprate, diethylene glycol dioctanoate, octyl isononanoate, isodecyl octanoate, diethylene glycol diisononanoate, isononyl isononanoate, isostearyl isostearate, behenyl behenate, C₁₂₋₁₅alkyl fumarate, laureth-2 benzoate, propylene glycol isoceteth-3 acetate, propylene glycol ceteth-3 acetate, octyldodecyl myristate, and cetyl recinoleate, myristyl myristate.

The examiner relies upon the following references:

Greczyn et al. (Greczyn)	5,302,381	Apr. 12, 1994
Schulz, Jr. et al. (Schulz)	5,654,362	Aug. 5, 1997
Lee et al. (Lee)	5,919,437	Jul. 6, 1999

Claims 2, 3, 5, 6, 8, 9, 11-14, 17-22, 24, 27-30 and 32-39 stand rejected under 35 U.S.C. § 103(a) as being obvious over the combination of Lee and Greczyn. In addition, claims 10, 15 and 16 stand rejected under 35 U.S.C.

§ 103(a) as being obvious over the above combination as further combined with Schulz. After careful review of the record and consideration of the issues before us, we reverse.

DISCUSSION

Claims 2, 3, 5, 6, 8, 9, 11-14, 17-22, 24, 27-30 and 32-39 stand rejected under 35 U.S.C. § 103(a) as being obvious over the combination of Lee and Greczyn.

According to the rejection, “Lee discloses a cosmetic composition which comprises a deodorant, an antiperspirant and/or an antimicrobial agent, a volatile silicone and a organopolysiloxane gelling agent . . . and may contain an emulsifier.” Examiner’s Answer, page 3. The rejection acknowledges that “Lee does not teach a nonionic surfactant or an emollient as instantly claimed.” Id.

Greczyn is cited for teaching a low residue antiperspirant of which a nonionic surfactant with an HLB greater than 10 is one of the components. But the rejection concedes that “Greczyn does not teach a silicone gel material as instantly claimed.” Id. at 4.

The rejection concludes:

It would have been obvious to one of ordinary skill in the art at the time of the invention to prepare the composition of Lee and substitute a nonionic surfactant as taught by Greczyn for its surfactant properties with the reasonable expectation of producing a low residue antiperspirant with smooth application and optimized odor and wetness protection.

Id.

Appellants argue that because Greczyn is drawn to a wax based system, it is not combinable with Lee. We agree.

“In rejecting claims under 35 U.S.C. § 103(a), the examiner bears the initial burden of presenting a prima facie case of obviousness. Only if that burden is met, does the burden of coming forward with evidence or argument shift to the applicant.” In re Rijckaert, 9 F.3d 1531, 1532, 28 USPQ2d 1955, 1956 (Fed. Cir. 1993). The test of obviousness is “whether the teachings of the prior art, taken as a whole, would have made obvious the claimed invention.” In re Gorman, 933 F.2d 982, 986, 18 USPQ2d 1885, 1888 (Fed. Cir. 1991).

Lee teaches cosmetic, antiperspirant compositions, while containing a silicone gel material, contain “no conventional waxy materials.” Id. at Col. 2, lines 46-47; see also Col. 4, lines 48-52. The cosmetic, antiperspirant composition of Greczyn, on the other hand, requires in addition to the surface active agent, “one or more low melting wax-like materials in an amount in total of from about 12 to 20 percent by weight.” Id. at Col. 5, lines 36-40. Thus, when the prior art of record is considered as a whole, one of ordinary skill in the art would not combine the teachings of Lee, which teaches away from the use of waxy substances, with the teachings of Greczyn, which requires the use of a waxy substance.

Moreover, as also argued by appellants, Greczyn teaches a broad range of surfactants, wherein the only criteria used in the choice of the nonionic surfactant is that it is a non-ionic ether or ester having an HLB value greater than 10. The examiner points to the teaching of polypropyleneglycol-5-ceteth-20

(PPG-5-ceteh-20) at column 6, line 42 of Greczyn. The surfactant in that case, however, is used as a coupling agent, and the rejection provides no motivation for including a coupling agent or that particular coupling agent in the cosmetic composition of Lee. The examiner also points to the teaching of polysorbate-20 and PEG distearate at column 7, lines 2-5 of Greczyn. Greczyn teaches the use of a large number of different nonionic surfactants, and there is no teaching or suggestion that would allow one of ordinary skill in the art to differentiate between those surfactants that would fall within the invention and those that would not. In addition, the PEG-distearate preferred by Greczyn is PEG-12 distearate, while claim 24 lists PEG-8 distearate, and the rejection does not address whether the PEG-12 distearate preferred by Greczyn has the properties required by the claimed invention.

Claims 10, 15 and 16 stand rejected over the above combination as further combined with Schulz. Schulz is cited by the rejection for teaching a silicone gel made from reacting a polysiloxane with an alpha, omega diene, a silicone oil and an emollient. See Examiner's Answer, page 4. Thus, Schulz does not remedy the deficiencies of the combination of Lee and Greczyn, thus the rejection is also reversed.

REVERSED

Donald E. Adams)	
Administrative Patent Judge)	
)	
)	
)	BOARD OF PATENT
Eric Grimes)	
Administrative Patent Judge)	APPEALS AND
)	
)	INTERFERENCES
)	
Lora M. Green)	
Administrative Patent Judge)	

Appeal No. 2002-0441
Application No. 09/273,152

Page 7

Colgate-Palmolive Company
909 River Road
Piscataway, NJ 08855

LMG/jlb